Supreme Court, U.S.
FILED
01 323 AUG 21 2001
OFFICE

No.

IN THE

Supreme Court of the United States

ELIZABETH WINKER

Petitioner

v.

BOEING COMPANY, THE

AND

MCDONNELL DOUGLAS CORPORATION

On Petition For Writ Of Certiorari
To The Eight Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Elizabeth Winker
PRO SE
126 Rutherglen
Valley Park, MO 63088

QUESTIONS PRESENTED

IS MENTAL ILLNESS A VALID DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)?

DOES MENTAL ILLNESS FALL UNDER THE REHABILITATION ACT?

SHOULD A LITIGATE BE PUNISHED FOR COUNSELS INCOMPETENCE?

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Elizabeth Winker, Plaintiff and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in this proceeding in case No. 00-1821 of that court on March 08, 2000, affirming the rulings in the United States District Court for the Eastern District of Missouri.

OPINION BELOW

The judgement of United States Court of Appeals Eight Circuit supporting the Judgement of the District Court is reported at App.1. The decision denying rehearing en blanc is reported at App.2. The decision of the United States District Court Eastern District Missouri Eastern Division to dismiss Counts I, III, and IV is reported at App. 3. The decision of the United States District Court Eastern District Missouri Eastern Division ruling Count II in favor of the Defendant is reported at App. 9.

JURISDICTION

The united States Court of Appeals for the Eighth Circuit entered its judgment on April 3, 2001. Petitioner timely filed a Petition fo Rehearing, which the Eighth Circuit denied [UNPUBLISHED], on April 6, 2001 United Sates Court of Appeals for the Eighth Circuit petitioner timely filed for rehearing en banc also denied May 23, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States

Constitution provides Exclusionary rule; no person can be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Petitioner Elizabeth Winker seeks damages from McDonnell Douglas Boeing company for WRONGFUL DISCHARGE Petitioner was employed on March 17, 1986 as a sheet metal assembler for McDonnell Douglas. She was diagnosed October 26, 1992 for Bi-Polar Manic Depressive Illness. July 1994 she signed a paper at medical first aid bldg. 4 stating she is a person with a handicap. The company was well aware the petitioner was mentally ill.
Spring of 1995 she was assigned to a supervisor who is called the(TERMINATOR). Loren Hodge tortured and harassed petitioner and called her a "nut." Hodge also wanted her to work a job without proper paper work and the ok to work from the Government. On December 4, 1995 Ms. Winker was discharged for attendance.

Miss Winker took her claim with the aid Mr. Scott Levine, Esq to the United States District Court Eastern District Missouri. Winker asked the court for damages under Americans with Disabilities Act, 42 U.S.C.ƒ 12101 et seq. (Count I) The Rehabilitation Act 29 U.S.C. ƒ794 (Count II), The Missouri Human Rights Act, Mo. Rev. Stat. Ch. 213 (Count III), and the Labor Management Relations Act, 19 U.S.C. ƒ185. Counts I, III, and IV were dismissed as untimely as Mr. Levine was delinquent in filing. Count II was awarded to the Defendant in a Summary Judgement. The case was appealed in full to the Eight Circuit Court of Appeals. The ruling of the lower court was upheld.

REASONS FOR GRANTING WRIT

Ms. Winker was instructed not to seek consul by her union during the arbitration that lasted from December 4, 1995 to February 11, 1997. When the arbitration was canceled Ms. Winker sought the aid of Mr. Mike Barrett, Esq. Mr. Barrett informed Ms. Winker of the EEOC for the first time. Ms. Winker immediately contacted the EEOC. As Mr. Barrett's practice does not encompass civil law, the Petitioner hired Mr. Levine on February 24, 1997 with a down payment of five thousand dollars for immediate action. Winker's complaint was filed with EEOC on February 25, 1997. The EEOC granted her a right to sue in early June. Mr. Levine then failed to file suit until September 8, 1997. Her claim under Counts I and III were delinquent from the time of her termination, so equitable tolling would be critical for these Counts to be valid. Judge Jean C. Hamilton of the District court whose ruling was upheld in appellate court did not grant equitable tolling, dismissing these Counts as Mr. Levine failed to notify the court of Ms. Winkers ignorance of the EEOC. This ignorance of " vital information bearing on the existence of [her] claim"*Chakonas v. City of Chicago,* 42 F.3d 1132, 1135-37 (7th Cir. 1994) is a suitable reason for the granting equitable tolling.

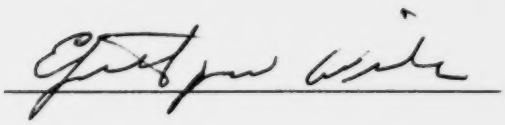
Count IV was also dismissed as the September 8, 1997 filing date was past the six months from the violation in February 1997. Ms. Winker hired Mr. Levine on February 24, 1997 for immediate action on this charge. The negligence was fully on Mr. Levine's side.

Count II was ruled in the Defendants favor as Justice Rodney W. Sippel in the district court said that she was unable to preform her job due to her attendance record. Judge Sippel took as fact the defendants attendance figure of 238 of the past 356 days. Mathematically it is imposible for

Ms. Winker to have missed more than 205 days even if every day in her five month leave of absence was counted and partial days counted as full. But by company rules the petitioner she only had four absences. Many of these absences were caused by stress from discrimination by her supervisor.

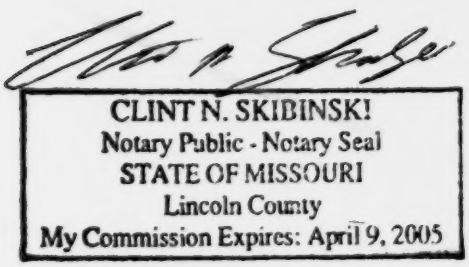
CONCLUSION

Respectfully Submitted,



Elizabeth Winker
PRO SE
126 Rutherglen
Valley Park, MO 63088

On this date of August 21, 2001.



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Rec. 6/1/01 UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
CA

No. 00-1821	* 4:97CV1862RWS
Elizabeth Winker,	* Appeal from the United
Appellant,	States
	* District Court for the
v.	* Eastern District of
The Boeing Company,	Missouri
Defendant,	*
McDonnell Douglas	*
Corporation,	*
Appellee.	*

Judgement

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.
(5172-010199)

April 6, 2001
MANDATE ISSUED
MAY 31 2001
A true copy.

ATTEST: s/Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

App. 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1821	*
Elizabeth Winker,	*
Appellant,	*
	*
v.	*
McDonnell Douglas Corporation,	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellee.	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
Judge Morris S. Arnold took no part in the consideration or decision of this case.
(5128-010199)

May 23, 2001

Order Entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Filed May 20. 1998
ELIZABETH WINKER,) U.S. DISTRICT COURT
plaintiff(s),)EASTERN DISTRICT OF.MO
)
vs.)Case No.4:97CV01862 GPG
THE BOEING COMPANY)
and)
MCDONNELL DOUGLAS CORP.,)
)
Defendant(s))

MEMORANDUM AND ORDER

This matter is before the Court on defendants Boeing and McDonnell Douglas' joint motion to dismiss.
plaintiff Elizabeth Winker filed this action on September 8, 1997. She alleges that defendants unlawfully discriminated against her when they refused to accommodate her disability and when they terminated her. She brings this claim pursuant to the Americans with Disabilities Act, 42 U.S.C. S 12101 etseg. (ADA) (Count I), the Federal Rehabilitation Act of 1973, 29 U.S.C. 5 706 et seq. (Count~II); and the Missouri Human Rights Act, Mo. Rev. Stat. 5 213.010 et seq. (MHRA) (Count III). Plaintiff also claims that defendants' acts violated the terms of a collective bargaining agreement. She therefore brings a claim pursuant to 5 301 of the Labor Management Relations Act, 19 U.S.C. 5 185 (124RA) (Count IV).

I. Relevant Background
According to the complaint and plaintiff's affidavit, the relevant facts are as follows Plaintiff suffers from bipolar, manic depression, which caused her to take periodic medical leaves between October and December 1993. During that period, she requested defendant McDonnell Douglas adhere to her medical
restrictions. McDonnell Douglas terminated plaintiff on

December 4, 1995. Plaintiff contacted her union, which filed a grievance on her behalf. plaintiff claims that her union representative told her that she could not pursue a claim with the Equal Employment Opportunity Commission (EEOC) until the completion of the grievance process. In early or late February 1997, plaintiff learned the union would not take her case to arbitration. She filed a complaint with the EEOC at that time and received a right to sue letter in early June 1997. She filed this action on September 8, 1997.

II. Discussion

Because the parties have attached affidavits to their pleadings, the Court will treat defendants' motion as one for summary judgment.

Summary judgment shall be entered if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986); Matsushita Elec Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In ruling on a motion for summary judgment, this Court views the evidence and all reasonable inferences which may drawn therefrom in the light most favorable to the nonmoving party. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 775 (8th Cir. 1995). In response to a properly supported motion, the nonmoving party must set forth specific facts, by affidavit or other evidence, which demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita 475 U.S. at 586.

A. ADA Claims

Defendants first argue that plaintiff's failure to file an EEOC charge within 300 days bars her ADA claim.

Plaintiff alleges she was terminated December 4, 1995. She filed an intake questionnaire with EEOC on February 25, 1997, 449 days after her termination. Accordingly, defendants argue that plaintiff's ADA claim is barred because she failed to file an EEOC charge within 300 days of the adverse personnel action. Plaintiff concedes she filed her charge out of time, but argues for equitable tolling.

Under the ADA, a plaintiff must file an EEOC charge within 180 days after the date of the "alleged unlawful practice.u Because Missouri also has a law prohibiting disability-based discrimination, a plaintiff has 300 days from the date of the allegedly discriminatory action to file an EEOC charge. See Conner v. Reckitt & Colan. Inc., 84 F.3d 1100, 1104 (8th Cir. 1996). The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADA, but is rather akin to a statute of limitations and is subject to waiver, estoppel and equitable tolling. Zii,es V. Trans World Airlines. ~ 455 U.S. 385, 393 (1982); Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file

1plaintiff claims that she filed a charge with EEOC at this time as well, and that e'due to internal EEOC processing errors and delays beyond Plaintiff's control,~ the complaint was not filed until June 3, 1997. Because either date is well past the 300 day requirement for filing an EEOC charge1 the Court need not resolve this question.

a timely charge, her action is barred unless she can demonstrate that the limitations period is subject to equitable modification. Drlng, 58 F.3d at 1327.

"Equitable tolling is appropriate when the plaintiff, despite,~ all due diligence, is unable to obtain vital information beering on the existence of his claime" Dring, 58 F.3d at 1328 (quoting Chakonas v City of Chicago~ 42 F.3d 1132, 1135-37 (7th Cir. 1994)). Equitable tolling does not require any misconduct by the defendant. Dring, at 1328; ~ee also Anderson V. Unisy~ Corp~, 47 F.3d 302, 306-07 (8th Cir. 1995) (stating that equitable tolling is premised on plaintiff's excusable neglect, which may or may not be attributable to defendant), cert. denied, 516 U.S. 913 (1995). "To determine whether a plaintiff in fact lacked vital information, a court should ask whether a reasonable person in the plaintiff's position would have been aware that he had been fired in possible violation of the (ADA]." Drjflg, 58 F.3d at 1329 (quoting Chakonas, 42 F.3d at 1135).

Plaintiff's sole basis for invoking equitable tolling is that her union representative told her that she had to complete the grievance process before she could file an EEOC charge. Following this advice, she waited until after its conclusion before filing the charge. Negligent advice of counsel is not

sufficient to invoke equitable tolling. Gilbert ex rel. Gilbert V. Secretary of Health & Human Servs., 51 F.3d 254, 257 (Fed. Cir. 1995). Plaintiff's pursuit of her grievance indicates she was aware her termination possibly violated the ADA. The Court sees no reason why the negligent advice of a union representative should excuse plaintiff from exercising due diligence. The Court will dismiss Count I of the complaint. For the same reasons, plaintiff's MHRA is untimely. Mo. Rev. Stat. S 213.075. The Court will dismiss Count III of the complaint.

B.
Rehabilitation Act
Defendants next argue that the statute of limitations bars Count II of the complaint. The Rehabilitation Act lacks a statute of limitations. When a federal civil rights statute does not impose its own statute of limitations, courts borrow the statute of limitations from the applicable state governing personal injury suits. See Cheeney v. Highland Community College, 15 F.3d 79, 81-82 (7th Cir. 1994); see also Wilson v. Garcia, 471 U.S. 261 (1985). Accordingly, for the purposes of plaintiff's claims under the Rehabilitation Act, Missouri's five year personal injury statute of limitations applies. Cheeney, 15 F.3d at~81; Mo. Rev. Stat. 5 516.120; see also Holmes V. Texas A & M University, 138 F.3d 168 (5th Cir. 1998); Southernland v. Hardaway Mgt.. Inc., 41 F.3d 250(6th Cir. 1994); Bates V. Long Island R.R., 997 F.2d 1028 (2nd Cir. 1993), cert. denied, 510 U.S. 992 (1993); Baker v. Board of Regents, 991 F.2d 628 (10th Cir. 1993). Plaintiff filed this action within five years of her dismissal. Accordingly, her Rehabilitation Act claim is timely.
Defendants next argue that even if timely, her claims brought pursuant to section 504 of the Rehabilitation Act are not sustainable. The Court disagrees.
Section 504 of the Rehabilitation Act addresses nondiscrimination under federal grants and programs:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> 29 U.S.C. S 794(a).

The Act defines "program or activity" as all of the operations of:

(A)an entire operation, partnership or other private organization, or an entire sole proprietorship--

(I)if assistance is extended to such corporation, partnership, or other private organization, or sole proprietorship as a whole; or

(ii)which is principally engaged in the business of providing educational health care, housing, social services, or parks and recreation; or

(B)the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship... any part of which is extended Federal financial assistance.

29 U S.C. 5 794(b)(3)(A) & (B).

Defendants have filed an affidavit from Sandra L. Parker, a litigatibn administrator. Parker attests that plaintiff only worked on procurement contracts and did not work on programs subsidized by the government or programs that received Federal financial assistance. This 'affidavit, however, does not address the question of whether the facility or facilities in which plaintiff worked received a subsidy or assistance. Defendants have not, therefore, provided evidence to support it~ motion on the Rehabilitation Act claim. The Court believes additional discovery will resolve this question, and defendants are free to file another motion for summary judgment when they have accumulated the evidence necessary to support one.

C. LMRA

Defendants next move to dismiss Count IV of the complaint, which is brought pursuant to section 301 of the LMRA. Defendants argue that this claim, like the others, was filed out of time.

In a suit for breach of a collective bargaining agreement which does not involve a provision to submit disputes to arbitration,

state contract law provides the applicable limitations period. DelCostello V- Teamsters, 462 U.S. 151 (1983). The matter differs where the collective bargaining agreement contains an arbitration provision, as here. Here, plaintiff cannot bring her claim for breach of the collective bargaining agreement without also alleging that the union failed to fairly represent her, regardless of whether she sues the employer, the union, or both. Chauffeurs. Teamsters & Helpers V. Terry, 494 U.S. 558, 564 (1990) (citing DelCostello, at 164-165). As such, the claim is a hybrid one, subject to the six month limitations period contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). DelCostello, at 169.
The facts are that plaintiff's claim accrued in late February 1997, when she learned her grievance was denied. This action was filed September 8, 1997, more than six months later. Count IV is therefore untimely and is dismissed.

III. Conclusion
For the reasons given above, the Court finds that plaintiff's ADA, MHRA, LMRA claims are untimely, and therefore they are dismissed. However, given the limited evidence before it, the

Court will deny defendants' motion to dismiss plaintiff's Rehabilitation Act claim.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss is GRANTED in part and DENIED in part.
IT IS FURTHER ORDERED that Counts I, II & IV of plaintiff's complaint are dismissed.
Dated this 20 day of May, 1998.

S/Jean C. Hamilton

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ELIZABETH WINKER,)
Plaintiff(s),) No. 4:97CV1862 RWS
) Filed
V.) JAN 12 2000
) U.S. DISTRICT COURT
MCDONNELL DOUGLAS CORP.,) E. DISTRICT OF MO.
Defendant(s).) ST. LOUIS

MEMORANDUM AND ORDER

This matter is before the Court on Defendant McDonnell Douglas Corp.'s (McDonnell Douglas") Motion for Summary Judgment. Plaintiff, Elizabeth Winker, claims that McDonnell Douglas terminated her employment at McDonnell Douglas because Winker 5uffers from bi-polar disorder. Winker claims that her termination violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794'. Summary Judgment will be granted to McDonnell Douglas because Winker cannot establish that she was able to perform the essential functions of her position at McDonnell Douglas when she was terminated. In order to prevail on a claim under Section 504 of the Rehabilitation Act, a plaintiff must show, among other things, that she is able to perform the essential functions of the job from which she was terminated.

1 Winker's Complaint also stated claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

the Missouri Human Rights Act Mo. Rev. Stat. §213.010 et seq. and the Labor Management Relations Act, 19 U.S.C. § 165. These claims were dismissed by the Court on May 20, 1998. Only Winker's claim under the Rehabilitation Act remains before the Court for consideration on defendant's Motion for Summary Judgment.

Background

Winker began working for McDonnell Douglas in March1986. She was employed as a sheet metal worker on the F-15, F-18 and Harrier jet projects.
Winker suffers from bi-polar disorder. This disorder is a mental illness that causes Winker to experience severe manic and depressive states. The disorder also causes suicidal tendencies. Further, Winker does not have normal sleep/wake cycles. She remains awake for days at a time after which she sleeps for days at a time.
As a result of her illness, Winker missed numerous days of work. She was first terminated in 3uly 1994 for failing to return from an extended leave of absence. Winker was reinstated. At Winker's request, and in an effort to accommodate her illness, Winker was moved from first to second shift.
Winker's absences continued after her reinstatement. From November 1994 through June 1995, Winker missed twenty-five full days of work and twelve partial days of work. In addition, from 3une 1995 through December 1995, Winker was on a leave of absence due to her illness.
During her final year of employment at McDonnell Douglas, Winker was absent 238 days.
McDonnell Douglas has a no-fault attendance policy. This policy provides for progressive discipline against covered

employees. The policy provides that after a specified number of days absent, employees are first given one oral warning, followed by three written warnings and finally, termination. Winker was a covered employee under the no-fault attendance policy. Winker received the warnings set forth in the attendance policy including the third written warning. Winker was terminated from her position on December 20,1995. McDonnell Douglas informed Winker that she was being terminated due to excessive absenteeism. Winker applied for disability benefits from the Social Security Administration in October 1993, prior to her termination from McDonnell Douglas. In her application, Winker stated that she became unable to work In 1991. Winker began receiving disability benefits in 1994. Winker. has not been employed since leaving McDonnell Douglas. She testified that she is unable to work currently because of her condition.

Legal Analysis

A. Standard of Review

When considering a motion for summary judgment, the Court must determine whether the record, when viewed in the light most favorable to the non-moving party, shows any genuine Issue o~ material fact. Fed. R. Civ. P.56(c). See generally, Celotex Corp. v. Catrett 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby. Inc. 477 U.S. 242, 249-50(1966). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record, which it believes demonstrate the absence of a genuine Issue of material fact. Celotex 477 U.S. at 323. There is, however, no express or implied requirement in Rule 56 that the moving party must support its motion with affidavits or

other materials negating the opponent's claim. Id. The burden is not on the moving party to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Id. at 325. Instead, the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Ld. As long as the record before the court demonstrates that there is no genuine issue of material fact, summary judgment should be granted. Id. at 323.

When faced with a motion for summary judgment meeting the standard set forth above, the non-moving party may not rest upon the mere allegations or denials of its pleadings alone, but must introduce affidavits, depositions, answers to interrogatories, or admissions on file designating specific facts showing that there is a genuine issue of material fact for trial. Celotex 477 U.S. at 324; Jetton V. McDonnell Douglas. Corn. 121 F.3d 423, 427 (8th Cir. 1997); Noli V. Petrovskv, 828 F.2d 461, 462 (6th Cir. 1987). Further, a plaintiff facing a motion for summary judgment must designate specific facts showing a genuine issue of material fact on each essential element of his claim. Id.

B. Winker's Rehabilitation Act Claim

The Rehabilitation Act provides that no otherwise qualified individual with a disability shall be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The act applies to employers who receive federal financial assistance. Winker asserts that she can make a claim under the Rehabilitation Act because some of McDonnell

Douglas' program receives federal funding. McDonnell Douglas concedes that some of its programs receive federal financial assistance. But, McDonnell Douglas contends that the Rehabilitation Act does not cover Winker's claim because she was not employed by a program that received federal financial assistance. It is unnecessary for the Court to determine whether Winker's claim is covered by the Rehabilitation Act because even if the Act did apply, Winker cannot establish a prima facie case for the claim. To state a prima facie claim under the Rehabilitation Act, Winker must show:

1) she Is a person with a disability as defined by the statute; 2) she is otherwise qualified for the job from which she was terminated; and 3) she was terminated due solely to discrimination based upon her disability. See, Randolph v. Rodgers 170 F.2d 850,858(8"' Cir. 1999); Amir v. St. Louis University 184 F.3d 1017, 1029 n.5 (8"' Cir.1999).

The parties do not contest that Winker is disabled under the Rehabiliation Act. Therefore, the Court begins its analysis of Winker's claim by determining if Winker Is qualified for the position she held before her termination. The Court uses a two-step analysis to determine whether the plaintiff is qualified for the sought after employment. Browning v. Liberty Mutual Ins. Co., 176 F.3d 1043, 1047 (8th Cir. 1999). First, the Court determines whether the plaintiff has the requisite skills, education, certification or experience necessary for the job. Id. Second, the Court determines whether the plaintiff can, despite her impairments, perform the essential functions of the job either with or without reasonable accommodation. Id.

Winker cannot satisfy both steps of the qualification analysis. There is no question that Winker has the requisite skills to perform the job of sheet metal worker at McDonnell Douglas. Winker could not however perform all

of the essential functions of her job because she was absent a large part of the time. Winker missed 238 of her last 365 days of employment with McDonnell Douglas. The record establishes that Winker's absenteeism was chronic and ongoing.

Winker argues that attendance at work was not an essential function of her job. She argues that there is no indication that her absenteeism affected the timeliness of the projects on which she worked. Therefore, Winker argues her attendance was not an essential function of her job.

Winker's argument misses the point. It Is axiomatic that in order to be able to perform all of the essential functions of a job, the worker must at the very least be able to show up for the work. Browning, 178 F.3d at 1046. "An employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job In question, much less the essential ones." Moore v. Payless Shoe Source. Inc., 187 F3d. 845, 848 (8th Cir. 1999). Attendance is an essential function of any job including Winker's. That essential function may, however, be modified to accommodate a plaintiff's disability. For instance, If work can be done off-site, then attendance on-site may not be essential, an accommodation of off-site work might be possible. If the work must be done at the company's site however, then the worker must be able to show up for the work there. An employer is not required to change the essential nature of the job In order to accommodate an individual's special needs. Mole v. Buckhorn Rubber Products. Inc. 165 F.3d 1212, 1218 (8th Cir. 1999). "An employer is not required to hire additional employees or redistribute essential functions to other employees" when making an accommodation. Winker did not a have job that could accommodate an inability to be present at the workplace. Winker's job involved manufacturing aircraft. Winker could not perform

her work from home or from a satellite office. Winker's job as a sheet metal worker had to be done on site. The record establishes that Winker could not be present on site with any regularity. Attendance on site was an essential function of Winker's job that could not be accommodated. Winker was unable to perform all essential functions of her job. This determination, that Winker was unable to perform the essential functions of her job, is supported by Winker's sworn statement in her application for disability benefits. In that application Winker affirmatively stated that she was unable to work as early as 1991. Prior sworn statements of Inability to work will justify. summary judgment in a subsequent claim under the Rehabilitation Act, unless the plaintiff comes forward with an explanation sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without reasonable accommodations." Moore v. Payless Shoe Source. Inc. 187 F.3d 845, 847 (8th Cir. 1999) (quoting Cleveland v. Policy Management Systems Corn. 526 U.S. 795(1999)). Winker has not come forward with any explanation that would support a finding that at the time she was terminated she was able to perform the essential functions of her job. Attendance on site at McDonnell Douglas' facility was an essential part of Winker's job. Winker could not attend regularly and McDonnell Douglas could not move her work off-site. Winker was not "qualified" for employment as that term is defined by the Rehabilitation Act.

Because Winker cannot establish that she was qualified to receive the benefits she seeks in her Rehabilitation. Act claim, her claim must fall. It is unnecessary to analyze Winker's Rehabilitation Act claim any further.

Accordingly,
IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment is GRANTED. The remaining claim against defendant is dismissed.

An appropriate Judgment will accompany this Order.

s/Rodney W. Sippel
Rodney W. Sippel
UNITED STATES DISTRICT JUDGE

Dated this 12th day of January, 2000.